

NO. COA14-428

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

TRACEY CLINE
Plaintiff-Appellant,

v.

Wake County
No. 13 CVS 10185

DAVID HOKE, Individually and
as the Custodian of the
Public Records Pursuant to
N.C.G.S. § 132-2,
Defendant-Appellee.

Appeal by Plaintiff from order entered 1 November 2013 by
Judge Paul G. Gessner in Superior Court, Wake County. Heard in
the Court of Appeals 25 September 2014.

Tracey Cline, Plaintiff-Appellant, pro se.

*Attorney General Roy Cooper, by Special Deputy Attorneys
General Melissa L. Trippe and Amar Majmundar, for
Defendant-Appellee.*

McGEE, Chief Judge.

Tracey Cline ("Plaintiff") filed an action against David
Hoke ("Defendant"), individually and in his official capacity as
assistant director of the North Carolina Administrative Office
of the Courts ("AOC"), in order to obtain certain AOC emails
pursuant to North Carolina's public records law. The trial
court dismissed Plaintiff's case, in part, for failure to state

a claim upon which relief could be granted. We conclude that Defendant is not the designated custodian of the AOC's public records, and thus we affirm the trial court's dismissal.

I. Background

Plaintiff, a former Durham County district attorney, sought to obtain some emails related to her service as district attorney in preparation to defend a complaint filed against her by the North Carolina State Bar. In the present action, Plaintiff sought certain email exchanges that she alleged were in Defendant's custody. Plaintiff made repeated requests to Defendant and to AOC's general counsel, Pamela Weaver Best ("General Counsel"), between June and December of 2012 to obtain these emails. Although Plaintiff initially corresponded with both Defendant and General Counsel regarding her public records request, Plaintiff eventually corresponded almost exclusively with General Counsel. During that period of time, Defendant did send Plaintiff a number of the emails she had requested. However, Plaintiff always contended there were additional relevant emails that Defendant had not sent her. Plaintiff filed this action against Defendant, individually and in his official capacity as the purported custodian of the public records she was seeking.

Defendant moved to dismiss Plaintiff's case pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), in part, on the grounds that Plaintiff had failed to state a claim upon which relief could be granted. The trial court granted Defendant's motion to dismiss by order entered 1 November 2013. Plaintiff appeals.

II. Standard of Review

The standard of review of an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of [her] claim which would entitle [her] to relief.

Grant v. High Point Reg'l Health Sys., 184 N.C. App. 250, 252, 645 S.E.2d 851, 853 (2007) (citations and internal quotation marks omitted). Moreover, the North Carolina Supreme Court held in *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010), that

the policy rationale underpinning the Public Records Act . . . strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that . . . public records and

information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

The only task at hand for purposes of Rule 12(b)(6) is to test the legal sufficiency of the complaint.

(citation omitted).

III. Suing Defendant in His Individual Capacity

N.C. Gen. Stat. § 132-6(a) (2013) provides that a custodian of public records has a statutory duty to permit reasonable inspection of those records by the public. In order to compel an unresponsive custodian to fulfill this statutory duty, a party must sue the custodian of those records in the custodian's official capacity. See *Mullis v. Sechrest*, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) ("If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant [must be] named in an official capacity."); cf. *Lexisnexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __, __, 754 S.E.2d 223, 223, *supersedeas and disc. review allowed on other grounds*, __ N.C. __, 758 S.E.2d 862 (2014) (plaintiffs suing the director of the AOC in his official capacity for public records); *State Employees Ass'n of N.C.*, 364 N.C. at 206,

695 S.E.2d at 93 (plaintiff suing the Treasurer of the State of North Carolina in his official capacity for public records). In the present case, if Plaintiff wanted to sue Defendant specifically as a custodian of AOC's public records, she must have sued him in his official capacity. Therefore, Plaintiff's suit against Defendant in his individual capacity was properly dismissed under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013).

IV. Suing Defendant in His Official Capacity

Plaintiff next contends that she properly sued Defendant in his official capacity as the custodian of some of the AOC's public records. As already discussed, if Defendant was the custodian of the AOC's public records, Plaintiff could sue him in his official capacity to obtain access to the public records she was seeking. *See generally* N.C. Gen. Stat. §§ 132-1 *et seq.* (2013). If Defendant was not the custodian, however, he could not be compelled by law to provide access to public records as the custodian.

Plaintiff contends that Defendant was the custodian of all public records responsive to her public records request. Defendant, both in his emails to Plaintiff and in his brief before this Court, contends that he was the custodian of some, but not all, of the public records Plaintiff was seeking. General Counsel, generally acting on Defendant's behalf,

informed Plaintiff, on several occasions, that "the AOC is not the custodian" of its employee's emails, but rather that "[u]nder [North Carolina's] Public Records law, each individual employee is the custodian of his/her emails." At times, General Counsel's stated opinion to Plaintiff was that it was only "the individual *writer* of [a requested] email who is the custodian" and that "requests for emails or correspondence should be made of each person [who created those public records] individually." (emphasis added).

The AOC made an analogous argument earlier this year in *Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __, __, 754 S.E.2d 223, 225, *supersedeas and disc. review allowed*, __ N.C. __, 758 S.E.2d 862 (2014), involving the AOC's administration, support, and maintenance of the state's Automated Criminal/Infraction System database ("ACIS"), a "real-time criminal records database" that compiles the criminal court records for all of the superior courts in North Carolina. In response to a public records request for a copy of all the records within the ACIS database, the AOC erroneously contended that it was not the custodian of the records within ACIS and, instead, argued that each county clerk of court who input data into ACIS was the custodian of the individual records created by that respective county clerk of court; thus, the plaintiffs

would need to contact every county clerk of court in the state in order to obtain the records they were seeking. *Id.* at __, 754 S.E.2d at 225-26. However, this Court held that, because the AOC "created, maintains, and controls ACIS and is the only entity with the ability to copy the database[,] . . . ACIS is a record of the AOC and in the AOC's custody." *Id.* at __, 754 S.E.2d at 228.

Similarly, in the present case, Defendant contends that the emails of AOC employees are not within the custody of the AOC. Instead, Defendant essentially argues that these emails are the responsibility of a multitude of "custodians" - individual employees who created emails, and who are diffused throughout the AOC. In support of this position, Defendant directs this Court to materials developed by the North Carolina Department of Cultural Resources ("DCR"), which state that

[i]n most cases, the author, or originator, of [an] e-mail message is responsible for *maintaining* the "record" copy. However, cases in which the recipient has altered the message (made changes, added attachments, etc.), or when the message is coming from outside the agency (and therefore not documented anywhere within the agency); the recipient is the one responsible for *retaining* the message.

Who is Responsible for That E-mail Message?, State Archives of North Carolina, www.history.ncdcr.gov/SHRAB/ar/tutorials/Tutorial_email_20120501/index.html (from DCR's online e-mail management training tutorial for state employees) (emphasis added). However, Defendant appears to have confused the duty of public records custodians to *provide access to* public records with the rules that state employees must follow to *preserve* those records.

N.C. Gen. Stat. § 132-8.1 (2013) designates the DCR as the agency that oversees the state's records management program, but only for the "creation, utilization, maintenance, retention, preservation, and disposal of official records[.]" According to the DCR, "individual [employees] are responsible for managing state records[.]" Dep't of Cultural Res., *E-mail as a Pub. Record in N.C.: A Policy for Its Retention and Disposition* 4 (July 2009). However, the DCR also has expressly stated that "[l]egal custody of [state employees'] electronic mail rests with *the office* of the sender or recipient." *Id.* at 10 (emphasis added). Thus, each individual state employee who creates a public record is not automatically the custodian thereof.

Instead, N.C. Gen. Stat. § 132-2 (2013) provides that "[t]he public official in charge of an office having public records shall be the custodian thereof." N.C.G.S. § 132-2 has rarely been interpreted by our appellate Courts. However,

[i]n interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.

Frye Reg'l Med. Ctr. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990)). By using the singular word "[t]he" public official and in connection with that public official being "in charge of an office having public records," the statute designates a particular person within an office as being the designated custodian for that office's public records. *Accord generally* N.C. Att'y Gen. Office, Guide to Open Gov't and Pub. Records 4 (2008) ("Each office should have a 'custodian' of public records who is required to allow those records to be inspected."). As the *assistant* director of the AOC, Defendant is not *the* person in charge of the AOC and thus not the designated custodian of the AOC's records per N.C.G.S. § 132-2. *Cf. State Employees Ass'n of N.C.*, 364 N.C. at 206, 695 S.E.2d

at 93 (noting that the Treasurer of the State of North Carolina is the designated custodian for public records of the North Carolina Department of State Treasurer). Thus, the parties herein have misinterpreted North Carolina's public records law. Moreover, Plaintiff failed to pursue her action against the public official in charge of AOC's public records, who is the custodian thereof. Plaintiff's suit against Defendant in his official capacity is without merit and was properly dismissed.

Affirmed.

Judges GEER and STROUD concur.